EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(2)

No. 92-519

FILED

NOV 20 1992

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

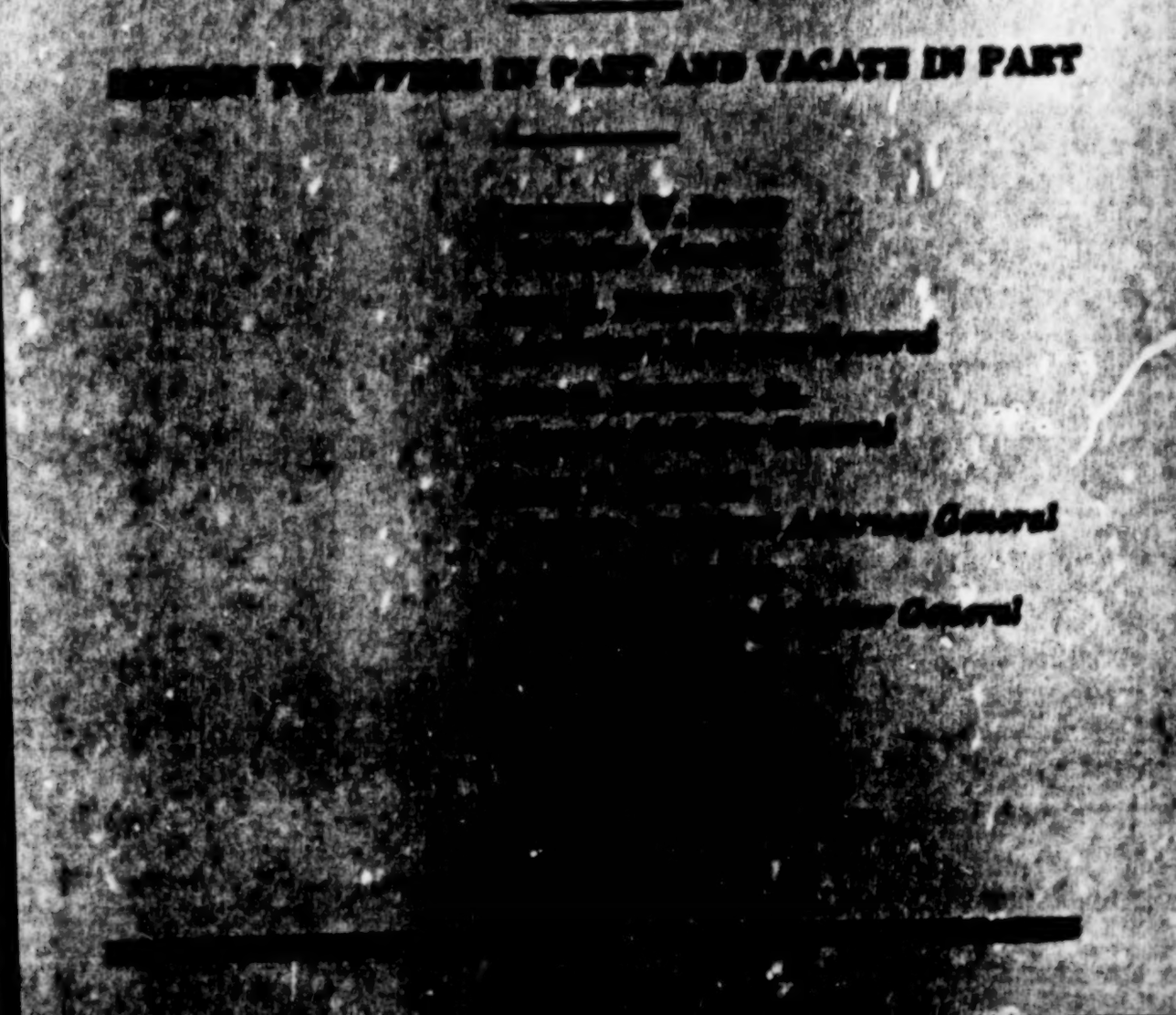
T.K. WETHERELL, ET AL., APPELLANTS

v.

MIGUEL DE GRANDY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

MOTION TO AFFIRM IN PART AND VACATE IN PART



QUESTIONS PRESENTED

1. Whether a showing under this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), that a racial minority group has been denied an equal opportunity to elect representatives of its choice to a statewide legislative body may be rebutted by evidence that the minority group is proportionally represented in a particular area of the State in which additional minority districts can be drawn, but is not proportionally represented in the State as a whole.

2. Whether the district court's finding that Hispanics are sufficiently numerous and geographically compact to constitute a voting majority in two additional districts is clearly erroneous.

3. Whether the district court abused its discretion in imposing a court-ordered plan for post-1992 elections without giving the State a greater opportunity to show that the plan interferes with state policy more than necessary to remedy the violation.

4. Whether the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), required the district court to abstain from deciding the United States' Section 2 claim when a similar Section 2 claim was made in a state court proceeding, but the United States was not a party to that proceeding.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	8
Conclusion	23
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Allen v. *McCurry*, 449 U.S. 90 (1980)	22
Brewer v. *Ham*, 876 F.2d 448 (5th Cir. 1989)	16
Campos v. *City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), cert. denied, 492 U.S. 905 (1989)	12-13
Doran v. *Salem Inn, Inc.*, 422 U.S. 922 (1975)	21
Gomez v. *City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), cert. denied, 489 U.S. 1080 (1989)	13
Kremer v. *Chemical Construction Corp.*, 456 U.S. 461 (1982)	22
McGhee v. *Granville County*, 680 F.2d 110 (4th Cir. 1988)	12
Thornburg v. *Gingles*, 478 U.S. 30 (1986)	3, 9, 10, 11, 15
Upham v. *Seamon*, 456 U.S. 37 (1982)	20
Westwego Citizens For Better Gov't v. *City of Westwego*, 906 F.2d 1042 (5th Cir. 1990)	16
Younger v. *Harris*, 401 U.S. 37 (1971)	20, 21

Statutes and rules:

Voting Rights Act, 42 U.S.C. 1971 *et seq.*:	
42 U.S.C. 1973 (§ 2)	1, 2, 8, 9, 11, 13, 15, 20, 21, 22
42 U.S.C. 1973j(d)	22
42 U.S.C. 1974j(f)	22
42 U.S.C. 1973aa-1a(b) (§ 203(b))	14
28 U.S.C. 1738	22

Supt. Ct. Rules:

Rule 14.1(a)	21
Rule 18.3	21

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-519

T.K. WETHERELL, ET AL., APPELLANTS

v.

MIGUEL DE GRANDY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

MOTION TO AFFIRM IN PART AND VACATE IN PART

OPINION BELOW

The opinion of the three-judge district court is reported at 794 F. Supp. 1076.

JURISDICTION

The judgment of the three-judge district court was entered on July 2, 1992. Notices of appeal were filed on July 24, 1992, and July 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

1. On June 23, 1992, the United States filed suit against the State of Florida, alleging that the State's redistricting plan for the Florida House of Representatives violated Section 2 of the Voting Rights Act,

42 U.S.C. 1973. App., *infra*, 1a-8a. The United States alleged that the State's plan fragments the Hispanic population in the Dade County area so that Hispanics comprise a majority of the voting age population (VAP) in only nine House districts. App., *infra*, 3a. If districts in Dade County were "divided into equally populated legislative districts which respect communities of interests and follow other nondiscriminatory plan-drawing criteria, Hispanics would constitute a significant voting-age majority of the population in two additional districts." App., *infra*, 4a. Citing racially polarized voting and other factors, the complaint alleged that "[u]nder the totality of circumstances, * * * the redistricting plan[] * * * deprive[s] Hispanic citizens * * * in the State of Florida of an equal opportunity to participate in the political process and to elect candidates of their choice to the State Legislature." App., *infra*, 5a.[1]

The United States' suit was consolidated with a redistricting suit that had been filed by another group of plaintiffs (the De Grandy plaintiffs), who had made allegations similar to those made by the

[1] The United States also alleged that the State's redistricting plan for the state Senate violated Section 2. That claim is not at issue on this appeal. It is, however, the subject of proceedings before this Court. The United States has appealed from the district court's decision finding the State's plan in violation of Section 2, but failing to afford relief. *United States* v. *State of Florida*, No. 92-767 (jurisdictional statement filed Oct. 29, 1992). A group of private plaintiffs have also appealed the district court's decision regarding the redistricting plan for the state Senate. *De Grandy* v. *Wetherell*, No. 92-593 (jurisdictional statement filed Sept. 29, 1992).

United States, and with another redistricting suit that had been filed by the NAACP and a number of individual plaintiffs. J.S. App. 12a, 18a-20a.

On June 26, 1992, the three-judge court began conducting a trial on the merits. J.S. App. 23a. The court expedited the trial so that it could resolve the case before the upcoming primary elections.

2. On July 1, 1992, at the conclusion of trial, the district court ruled from the bench in favor of the plaintiffs. In an opinion issued on July 17, 1992, the court explained that ruling. J.S. App. 7a.

a. Applying the framework established by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), the district court first found that while the State's plan created nine districts in which Hispanics would constitute "voting majorities," J.S. App. 40a, Hispanics were sufficiently numerous and geographically compact to constitute voting majorities in two additional districts. J.S. App. 40a-41a. In reaching that conclusion, the court relied on a plan introduced by plaintiff De Grandy (the De Grandy plan), which contained 11 districts in which Hispanics constitute at lease 64% of the VAP. J.S. App. 68a.

The court recognized that, because a significant number of Hispanics are noncitizens, it could not infer that Hispanics constitute a voting majority in the De Grandy districts just because they constitute a majority of the population in those districts. J.S. App. 32a, 39a, 40a n.28. Rather, the court concluded that the De Grandy districts contain Hispanic voting majorities because (1) experience from other cases suggests that when Hispanics constitute a VAP supermajority, they are likely to constitute a voting majority; (2) actual election returns in Dade County showed that Hispanic-supported candidates would have won if they had run in the De Grandy districts;

and (3) none of the De Grandy districts has such a high concentration of recent immigrants as to call into question the conclusion that Hispanics constitute a voting majority. *Id.* at 32a-40a, 69a-70a.

The court found that the State's plan created nine rather than 11 Hispanic districts by fragmenting and packing the Hispanic population in Dade County. J.S. App. 43a. For example, the court found that one district line cut directly through the middle of an Hispanic neighborhood. *Ibid.* The court found that one district was packed with Hispanic voters "to protect a white incumbent" in a nearby district. *Ibid.* And the court found that the way the State plan drew the lines in two other districts "repeated the process of fragmenting Hispanic communities." *Ibid.*

The court found that the De Grandy alternative eliminated this fragmentation and packing without compromising neutral districting principles. In particular, the court found that the De Grandy districts are "relatively compact," regular in shape, and conducive to "effective representation." J.S. App. 43a-44a.

The court also found that Hispanics are politically cohesive. J.S. App. 44a-47a. The court found that there was a "high degree of political cohesiveness among Cuban voters," and "a sufficient degree of political cohesiveness among [all] Hispanics." *Id.* at 45a-47a.

The court also found that Hispanics had been victimized by bloc voting. In particular, it found that whites and African-Americans usually vote sufficiently as a bloc to defeat the candidates preferred by Hispanics unless those candidates run from districts in which Hispanics constitute a voting majority. *Id.* at 48a-52a

In addition, the court cited evidence that Dade County is "profoundly divided" by the competing interests of Hispanics, African-Americans, and whites, each having different social and economic interests. J.S. App. 50a. The tensions among the three groups, the court concluded, have caused "ethnic factors • • • [to] predominate over all other factors in Dade politics." *Id.* at 50a-51a. The court also found substantial evidence of discrimination against Hispanics. *Id.* at 51a-53a. Although "Cubans have fared relatively well in South Florida," the court found, "language based discrimination still exists." *Id.* at 53a-54a.

Based on those findings, the court concluded that "the 'totality of the circumstances' show[s] that • • • Hispanic vote dilution exists in Dade County under Florida's House plan." J.S. App. 30a.

b. Immediately after issuing its ruling on liability, the court conducted a remedial hearing. At the hearing, appellants offered a plan that had only ten Hispanic districts. The court rejected that plan because it did not fully remedy the violation. J.S. App. 69a. Appellants then offered a second plan. That plan had 11 districts in which Hispanics constituted a supermajority of the VAP, but two of the districts had high concentrations of recent immigrants and Hispanic VAPs of only 61%. *Ibid.* The court concluded that Hispanics would not constitute a voting majority in those two districts, and rejected appellants' second plan on that basis. *Id.* at 69a-70a.

The De Grandy plaintiffs presented a modified version of their original plan. J.S. App. 70a. Like the original, the modified De Grandy plan has 11 districts in which Hispanics constitute a voting majority. *Ibid.* The court found that this plan "merg[ed] the De Grandy remedy for South Florida into the

existing Florida plan." *Ibid.* The court noted that the plan made adjustments in the State's plan north of the Dade County area. *Ibid.* But it found that those changes were "minor" and that they were necessary to comply with one-person, one-vote requirements. *Id.* at 70a-71a. The State nonetheless objected to the modified De Grandy plan on the ground that it interferes with state policy choices outside Dade County.

In response, the United States suggested that the court begin with the 11 Hispanic districts from the original De Grandy plan and then allow the State to draw the remaining districts. VIII Tr. 141-142. Appellants rejected that proposal, however, VIII Tr. 141-144, and the court recessed. VIII Tr. 159. When the court returned, appellants announced that they would after all be willing to accept the United States' proposal, *ibid.* But the court announced that it had "done the best that we can with this case" and adopted the modified De Grandy plan. VIII Tr. 160. As the court explained in its opinion, the court concluded that the modified De Grandy plan "best remedies the dilution of the Hispanic vote in South Florida." J.S. App. 71a.

The court ordered that the 1992 elections be held under the modified De Grandy plan. J.S. App. 2a. It also ordered that the modified De Grandy plan be used for post-1992 elections. *Ibid.*

3. Judge Vinson filed a concurring opinion. He explained that appellants' estimates of Hispanic citizenship rates, which appellants used to argue that Hispanics did not constitute a majority of the eligible voters in some of the districts in the De Grandy plan, were "unreliable" and "must be viewed with low confidence and with a large range of error."

J.S. App. 74a. He added that appellees had used "a more relevant calculation * * * designed to account for, *inter alia*, citizenship" and also noted the significance of appellees' evidence that Hispanics could elect representatives of their choice in each of the 11 De Grandy districts. J.S. App. 75a.

With respect to the court's remedial determination, Judge Vinson explained that the court had examined the two remedial plans proposed by appellants but that "neither of [them] was even close to meeting Section 2's requirements * * * in accordance with [the] court's findings on liability." J.S. App. 75a. He noted that appellants had also been given the opportunity to "draw a plan that incorporated the De Grandy plan for Dade County into the rest of the state," but that appellants had refused to do so and that it was "apparent that [appellants] were intent on delaying the adoption of any plan that implemented a true eleven-Hispanic districts House plan for Dade County." J.S. App. 76a. He characterized as "too late" appellants' "belated change o[f] position and announcement," after the court had adopted the modified De Grandy plan, that they would be willing after all to draw a plan that incorporated the 11 De Grandy Hispanic districts. *Ibid.*

4. On July 16, 1992, this Court issued a stay of the district court's judgment pending the outcome of this appeal. J.S. App. 139a. The 1992 elections have now been held under the State's plan.

ARGUMENT

The district court's liability determination reflects a straightforward application of this Court's decision in *Gingles*. Accordingly, it should be summarily affirmed.

At the remedial stage of the proceedings, however, the district court did not conduct the kind of proceeding that generally ought to precede the imposition of a permanent court-ordered plan. Time constraints and appellants' failure to submit a bona fide remedial plan could have justified the court's decision to impose the modified De Grandy plan for the 1992 elections. Before imposing that plan for post-1992 elections, however, the district court should have given appellants a more complete opportunity to show that the modified De Grandy plan interferes with state policy more than necessary to remedy the violation. The court's order directing post-1992 elections to be held under the modified De Grandy plan should therefore be summarily vacated.

1. Appellants contend that the district court's liability determination is premised on the view that Section 2 requires a State to maximize a minority group's voting strength. J.S. 15-16. Appellants are mistaken. The district court's liability determination reflects a straightforward application of this Court's decision in *Gingles*.

a. In *Gingles*, this Court held that a minority group challenging a multimember district as a violation of Section 2 must show that (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) "it is politically cohesive;" and (3) the "majority votes sufficiently as a bloc to enable it * * * usually to

defeat the minority's preferred candidate." 478 U.S. at 48-51. Once those preconditions have been established, a court must then consider other relevant factors to determine whether, under the totality of the circumstances, minority group members have been denied an equal opportunity to participate in the political process and to elect representatives of their choice. *Id.* at 77-80.

This Court did not decide in *Gingles* whether the same approach should govern challenges to single-member districts. 478 U.S. at 46-47 n.12. As we have argued in our brief amicus curiae in *Growe* v. *Emison*, No. 91-1420, at 8-12, however, plaintiffs alleging that single-member districts violate Section 2 are also subject to the requirements set forth in *Gingles*.

The district court carefully analyzed the *Gingles* preconditions here. It found that the State's plan fragmented and packed the Hispanic population and that, absent that fragmentation and packing, Hispanics are sufficiently numerous and geographically compact to constitute a majority in 2 additional single-member districts. J.S. App. 30a-44a. It found that Hispanics are politically cohesive. *Id.* at 44a-47a. And it found that non-Hispanics usually vote sufficiently as a bloc to defeat Hispanic-preferred candidates except when those candidates run in districts in which Hispanics constitute a voting majority. *Id.* at 48a-51a.

The court also cited evidence that Dade County is "profoundly divided" along racial and ethnic lines, that there are "tension[s]" among Hispanics, whites, and African-Americans, and that "ethnic factors * * * predominate over all other factors in Dade politics." J.S. App. 50a-51a. That evidence refutes

any suggestion that the observed bloc voting patterns are simply a response to particular candidates and that other candidates equally preferred by the minority might be able to attract the support of the majority. *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring in the judgment).

Finally, the court found substantial evidence of discrimination against Hispanics, including language-based employment discrimination. J.S. App. 53a. Such evidence is also 'supportive of" a finding of vote dilution (*Gingles*, 478 U.S. at 48-49 n.15, 80), because it "strengthen[s] a court's confidence that minority voters will be unable to overcome the relative disadvantage at which they are placed by a particular districting plan," and "suggest[s] a more general lack of opportunity to participate in the political process." *Id.* at 93 (O'Connor, J., concurring in the judgment).

Based on those findings, the district court concluded that plaintiffs had satisfied each of the *Gingles* preconditions and that the "totality of the circumstances" showed that the State's plan denied Hispanics an equal opportunity to participate in the political process and to elect representatives of their choice to the Florida House of Representatives. J.S. App. 30a. In short, the district court followed the approach set forth by this Court in *Gingles*.[2]

---

[2] As we noted in our brief amicus curiae in *Voinovich* v. *Quilter*, No. 91-1618, at 15 n.7, it may be that plaintiffs seeking to challenge the drawing of single-member districts must meet proof requirements beyond those applicable in the context of challenges to multimember districting schemes. The evidence before the district court was sufficient to meet any such higher evidentiary burden and, in any event, appellants do not challenge the district court's judgment on this ground.

b. Appellants' sole basis for their claim that the district court applied a maximization standard is that the court did not acept their proportional representation defense. J.S. 18-19. Appellants argue that they showed that the State's plan affords the Hispanic community proportional representation in Dade County because "nine of the 18 Dade County House districts will contain majority Hispanic voting age populations" and "50% of the voting age population of Dade County is Hispanic." J.S. 19. According to appellants, that constituted a complete defense to plaintiffs' Section 2 claim. We agree that persistent proportional representation is generally a defense to a Section 2 claim. See *Gingles*, 478 U.S. at 77 (Opinion of Brennan, J.); *id.* at 102 (O'Connor, J., concurring in the judgment). But appellants have selected the wrong frame of reference in mounting that defense.

The United States did not claim that the State's plan denied Hispanic voters *in Dade County* an equal opportunity to elect representatives of their choice to the Dade County local government. The United States claimed that the State's plan deprived Hispanics *in the State of Florida* of an equal opportunity to elect candidates of their choice to the state House of Representatives. App., *infra*, 5a. Appellants' showing that Hispanics are proportionally represented in Dade County is unresponsive to that claim. To mount a successful proportional representation defense to the United States' statewide claim, appellants would have to show that Hispanics throughout the State are proportionally represented in the Florida House.

It is true that the United States alleged in its complaint—and proved at trial—that the State could

have drawn two additional minority districts in the Dade County area. App., *infra*, 4a. But that did not transform the United States' statewide claim into a regional one. Rather, the premise of the United States' complaint was that to remedy dilution throughout the State, the State was required to draw minority districts where it could. The fact that Dade County is where such districts could be drawn does not change the fact that a defense based on proportionality must relate to the statewide discrimination charged.[3]

The situation is the same as that presented when plaintiffs challenge an at-large election system on the ground that it dilutes minority voting strength. To show that there is a remedy for such dilution, plaintiffs need only show that minorities are sufficiently concentrated in *one area* of the relevant political unit to constitute a voting majority in a single-member district. The drawing of a minority district in that area can remedy the dilution throughout the political unit, even though many minority voters may live outside the remedial district. See *McGhee* v. *Granville County*, 860 F.2d 110, 118-119 & n.9 (4th Cir. 1988); *Campos* v. *City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988), cert. denied, 492 U.S. 905

[3] Because Hispanics are most heavily concentrated in the Dade County area, much of the proof in this case—including proof of racially polarized voting—focused on the Dade County area. The evidence also makes clear, however, that voting is polarized along ethnic lines throughout the State, as one of appellants' own experts testified. See VI Tr. 246 ("generally speaking voting did tend to be polarized in Florida"); GX 13, at 4-5. Indeed, the State conceded that fact in proceedings in this same case before the same three-judge court regarding congressional redistricting. J.S. App. 79a.

(1989); *Gomez* v. *City of Watsonville*, 863 F.2d 1407, 1414 (9th Cir. 1988), cert. denied, 489 U.S. 1080 (1989).

Appellants' theory is fraught with theoretical and practical difficulties. For example, appellants offer no logical basis for selecting the geographic area in which proportional representation will provide a defense to a Section 2 claim. While appellants initially describe Dade County as the relevant geographic area, they later suggest that the "Dade County area" might be the relevant area. J.S. 4 n.11. With equal force, appellants could have defined a geographic area consisting of the nine Hispanic majority districts in the State's plan, all of which are contiguous. Appellants could have then argued that, in that area, Hispanics are far overrepresented since they constitute only approximately 72% of the population in those districts,[4] yet will apparently elect 100% of the representatives. If proof of that sort of "overrepresentation" were sufficient to defeat a Section 2 claim, defendants would apparently be able to defeat any such claim in which there is at least one majority minority district.

For those reasons, when plaintiffs make a statewide claim of vote dilution involving a legislative body with statewide jurisdiction, the relevant area for determining a proportional representation defense must be the entire State as well. Any other approach compares apples and oranges. The Florida House has 120 seats, and Hispanics constitute 11.7% of the State's VAP. J.S. App. 9a; GX 6, at 36. If a plan had been designed to afford Hispanics representation

[4] The figure of 72% is calculated by adding the Hispanic percentages of each of the nine districts as found by the district court, J.S. App. 67a, and dividing by nine.

in proportion to their voting age population, it would have 14 Hispanic seats (120 × 11.7% = 14). The State's plan, however, has only nine Hispanic seats. J.S. App. 67a. Appellants therefore have not shown that the State's plan provides statewide proportional representation.[5]

---

[5] In mounting their proportional representation challenge in this Court, appellants rely upon figures concerning the proportion of the voting age population of Dade County that is Hispanic. See J.S. 18-19. They do not argue that *citizen* voting age population is the proper measure of proportional representation. Nor did they introduce evidence at trial on the statewide Hispanic citizen voting age population. Accordingly, this appeal does not raise any question concerning whether citizen voting age population is the proper measure of proportional representation.

It has come to our attention, from information supplied to us by the Census Bureau for purposes of certifications under Section 203 of the Voting Rights Act, 42 U.S.C. 1973aa-1a(b), unrelated to this case, that Hispanics constitute 7.15% of the citizen voting age population of Florida. Thus, if a plan had been designed to afford Hispanics representation in proportion to their numbers in the *citizen* voting age population, it would apparently have eight or nine Hispanic seats (120 × 7.15% = 8.58).

The Census Bureau figures are not in the record in this case, and therefore are not properly before this Court. But, as we argue below, pp. 19-20, *infra*, this case should be remanded to the district court in any event. At that point, should appellants attempt to rely on these figures, the district court would have to decide in the first instance whether the evidence may be considered and whether it should result in any modification of the judgment. Among other things, the district court may consider (1) whether appellants have waived any proportional representation defense based on citizen voting age population, (2) whether appellants could have discovered this evidence through due diligence, (3) whether citizen voting age population, voting age population, or total population is the proper measure of proportional representation, and (4) whether the facts of this case compel a finding of a Section 2 violation, even if there is proof of statewide proportional representation, see *Gingles*, 478 U.S. at 102 (O'Connor, J., concurring in the judgment). We do not believe that these issues are properly framed for consideration by this Court at this point.

2. Appellants next argue (J.S. 21-25) that the district court applied an improper legal standard in finding that Hispanics constitute a majority in the 11 De Grandy districts. According to appellants, the district court relied solely on the fact that Hispanics constitute a VAP majority in these districts, failing to take into account that a substantial number of Hispanics are noncitizens. When noncitizens are factored out, appellants contend, Hispanics constitute a majority in only three of the De Grandy districts. J.S. 22 & n.43. Appellants have mischaracterized the district court's approach to this issue.

The district court did not simply find that Hispanics constitute a VAP majority in the 11 De Grandy districts. It found that Hispanics constitute a "voting majorit[y]" in those districts. J.S. App. 40a. The court used that phrase to refer to a majority of the eligible voters—*i.e.*, citizen voting age population—as demonstrated by the court's express statement that its calculation of the Hispanic composition of the districts "account[ed] for citizenship." *Id.* at 40a & n.28; see also *id.* at 74a-75a (Vinson, J., concurring). Accordingly, while appellants try to frame the issue differently, the real question is whether the district court's finding that Hispanics constitute a voting majority in the 11 De Grandy districts was clearly erroneous. In our view, it was not.

In resolving this issue, the district court first took into account experience from other cases indicating that when Hispanics constitute more than 60% of the VAP, they are likely to constitute a voting majority. J.S. App. 31a-32a, 39a-40a & n.28. Because all the De Grandy districts are over 60% Hispanic in VAP, that experience is relevant here. In fact, all the De Grandy districts are over 64% Hispanic in VAP. That makes it even more likely that Hispanics constitute a voting majority in those districts. Cf. *Brewer* v. *Ham*, 876 F.2d 448, 452 (5th Cir. 1989) (evidence that blacks constitute a supermajority of the total population is sufficient to show that they constitute a voting majority).

Second, the district court considered actual election returns showing that Hispanic-preferred candidates would have won if they had run in the De Grandy districts. J.S. App. 36a-37a. Because voting in Dade County is highly polarized, such evidence further supports the conclusion that Hispanics constitute a voting majority in those districts. *Westwego Citizens For Better Gov't* v. *City of Westwego*, 906 F.2d 1042, 1046-1047 (5th Cir. 1990).

Finally, the district court carefully examined evidence about where citizens and noncitizens are most heavily concentrated in Dade County. J.S. App. 38a, 57a, 58a n.46, 69a-70a. The court satisfied itself that none of the De Grandy districts has such a high concentration of recent immigrants as to call into question the conclusion that Hispanics constitute a voting majority.

Appellants contend (J.S. 23-24) that the district court applied an unbending 60% rule, automatically assuming that if Hispanics constitute over 60% of the VAP in a district, they necessarily constitute a

voting majority. But as the discussion above demonstrates, the court did no such thing. While the court used the 60% VAP figure as one factor in its analysis, it also relied on evidence that the De Grandy districts are all over 64% Hispanic in VAP, that Hispanic preferred candidates would have won if they had run in the De Grandy districts, and that none of the De Grandy districts has an overly high concentration of noncitizens.[6]

Appellants also argue (J.S. 25) that the district court erred in failing to credit their expert's opinion that Hispanics constitute a voting majority in only three of the 11 De Grandy districts. Their expert's opinion should have been treated as conclusive, appellants contend, because it was based on "actual data." *Ibid.*

Appellants' expert did not, however, produce actual data on the percentage of Hispanics eligible to vote in each De Grandy district. Such data were not available. See J.S. App. 74a (Vinson, J., concurring). Appellants' expert began with the overall citizenship rate in Dade County, which he got from the Census; he then performed a regression analysis to

---

[6] The district court's rejection of appellants' remedial plan illustrates the district court's flexible, fact-intensive approach. Appellants' second proposed remedial plan had 11 districts in which Hispanics constituted over 60% of the VAP. J.S. App. 69a. Because two of those districts were only 61% Hispanic in VAP and because they contained high concentrations of recent immigrants, however, the court determined that Hispanics would not constitute a voting majority in those two districts. *Id.* at 69a-70a. That conclusion demonstrates that the district court was aware that the relevant inquiry was not merely whether Hispanics constituted a majority of the VAP in the districts at issue, but rather whether Hispanics constituted a majority of the eligible voters in those districts.

estimate the percentage of Hispanic and non-Hispanic citizens in Dade County; and he then used those county-wide figures to estimate the Hispanic citizen VAP in each De Grandy district. *Ibid.* Accordingly, what appellants refer to as "actual data" are really estimates derived from estimates.

In addition, the analysis performed by appellants' expert was seriously flawed. It relied upon a county-wide Hispanic citizenship rate that was subject to a high rate of error. See J.S. App. 74a (Vinson, J., concurring). It did not attempt to deal with possible variations at the district level. J.S. App. 38a n.26. And it took no account of other evidence in the record. In particular, it posited that districts in which Hispanics constitute 66% of the VAP are under 50% Hispanic in eligible voters (*id.* at 38a), even though election returns establish that any district over 65% Hispanic in VAP is a "safe" Hispanic seat. *Id.* at 37a; see generally *id.* at 74a-75a (Vinson, J., concurring). Given those deficiencies, the district court understandably concluded that appellants' evidence could not overcome plaintiffs' showing that Hispanics constitute a voting majority in the 11 De Grandy districts.

3. Appellants argue (J.S. 25-27) that the district court abused its discretion in imposing the modified De Grandy remedial plan. Appellants challenge that remedial decision on several grounds.

Appellants first assert (J.S. 26) that the district court did not give them an opportunity to introduce their own remedial plan. That assertion is inaccurate. The district court permitted appellants to introduce two remedial plans. J.S. App. 68a-69a. Appellants do not take issue with the district court's

conclusion (*id.* at 68a-70a) that neither of those plans came close to remedying the proven violation.

Appellants next contend (J.S. 26-27) that the court's remedial plan interferes with state policy more than necessary to remedy the violation. In particular, appellants assert that the court's remedial plan deviates from the State's plan in areas outside of Dade County. But the district court found that those adjustments were minimal and necessary to comply with one-person, one-vote requirements. J.S. App. 70a-71a. Appellants have not shown that those findings are clearly erroneous.

Appellants nonetheless argue with considerable force that the district court's remedial proceeding did not afford them an adequate opportunity to show that the modified De Grandy plan needlessly disrupts state policy outside Dade County. J.S. 27. Specifically, they point out that they did not receive the modified De Grandy plan until the beginning of the remedial hearing, that the proponent of the plan addressed the court not as a witness, but in a narrative fashion from the podium, and that they had no opportunity to cross-examine him. *Ibid.*

We agree with appellants that the district court did not conduct the kind of remedial proceeding that should precede the adoption of a permanent remedial plan. On the other hand, the district court had to act quickly so that it could afford relief in time for the upcoming elections. Moreover, appellants complicated the district court's task when they introduced two remedial plans that failed to remedy the violation and then refused to accept (until after the court had reached its decision) another alternative proposed by the United States, under which they would have drawn a new plan incorporating the 11 De

Grandy Hispanic districts into the rest of the State as they saw fit. In those circumstances, the district court did not abuse its discretion in imposing the modified De Grandy plan for the 1992 elections. See *Upham* v. *Seamon*, 456 U.S. 37, 44 (1982) (when elections are imminent, district court has authority to order elections to be held in accord with plans "that do not in all respects measure up to legal requirements").

The district court did not, however, simply impose the modified De Grandy plan for the 1992 elections. It also imposed that plan for post-1992 elections as well. There is no justification for the district court's decision to take that action without first conducting a more complete and less hurried proceeding to determine whether the modified De Grandy plan disrupts state policy more than necessary to remedy the violation. Accordingly, to the extent that the district court's order imposes the modified De Grandy plan for post-1992 elections, it should be summarily vacated and the case should be remanded for further remedial proceedings.

4. Finally, appellants contend (J.S. 28-29) that the district court should have abstained from deciding the De Grandy plaintiffs' Section 2 claim because of the pendency of a state court suit in which the De Grandy plaintiffs asserted a Section 2 claim. According to appellants, this Court's decision in *Younger* v. *Harris*, 401 U.S. 37, 44 (1971), compels such absention.

Appellants do not present to this Court a claim that the district court should have abstained from adjudicating the Section 2 claims *of the United States* in this case. Their fourth question presented asks whether abstention is necessary "when the plaintiffs seeking federal court relief have previously raised,

and demanded and received adjudication of, identical claims in an ongoing state court proceeding." J.S. i. The United States was not a party to the state court proceeding—a fact that appellants never mention—and certainly never "raised, and demanded and received adjudication of" its federal claims in that proceeding. *Ibid.* Appellants thus do not present to this Court any claim that the district court should have abstained from deciding the Section 2 claims of the United States.[7]

Nor does anything in appellants' discussion of the abstention issue suggest that the scope of their questions presented should be broadened. Appellants correctly state that "[t]he district court declined to abstain from deciding *plaintiffs'* Section 2 challenges." J.S. 28 (emphasis added). But their entire argument that the district court's decision was wrong —or even that it raises any substantial question—specifically concerns the court's refusal to abstain from adjudicating the De Grandy plaintiffs' Section 2 claims. See *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 928-929 (1975). Their argument is based entirely on actions allegedly taken by the De Grandy plaintiffs—not the United States—in a prior state court proceeding.[8] J.S. 28-29. And appellants conclude their dis-

---

[7] Under Rule 18.3 of the Rules of this Court, "[t]he jurisdictional statement shall follow, insofar as applicable, the form for a petition for a writ of certiorari prescribed by Rule 14." Rule 14.1(a) provides that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by th[is] Court."

[8] In light of the fact that a final judgment had been issued by the Florida Supreme Court (J.S. App. 104a-138a) at the time that the trial in this case commenced, the doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971), would in any event

cussion by referring to the State's interest in "adjudicating the Voting Rights Act challenges * * * raised by the De Grandy plaintiffs," J.S. 29—not those of the United States.

In any event, Congress gave the United States authority to bring a civil action to enforce Section 2 of the Voting Rights Act, see 42 U.S.C. 1973j(d), and gave the federal district courts jurisdiction over such an action, 42 U.S.C. 1973j(f). In doing so, Congress made clear that the United States could not be required to exhaust state remedies before bringing a federal claim. See 42 U.S.C. 1973j(f) (district courts of the United States * * * shall exercise [jurisdiction over Section 2 claims brought by the United States] without regard to whether a person asserting rights under [Section 2] shall have exhausted any administrative or other remedies that may be provided by law"). Accordingly, even if appellants were correct in claiming that the district court should have abstained from adjudicating the De Grandy plaintiff's Section 2 claim, the abstention doctrine did not require the district court to abstain

---

have little impact on the ability of the district court to adjudicate this case. The preclusive effect of the final state court judgment should instead be measured by principles of *res judicata* as incorporated in 28 U.S.C. 1738, not by the abstention doctrine. We note that even a party is not bound by the judgment in a proceeding unless he has had a full and fair opportunity to litigate the claim resolved by the judgment. See *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 480-482 & n.22 (1982); *Allen* v. *McCurry*, 449 U.S. 90, 95 & n.7 (1980). It may be doubted whether the De Grandy plaintiffs had such an opportunity in the Florida Supreme Court, which noted "the limitations of [its] review, including both time constraints and the unavailabiilty of specific factual findings." J.S. App. 119a.

from deciding the United States' Section 2 claim as well.

CONCLUSION

The district court's finding of liability should be summarily affirmed. The district court's remedial order should be summarily vacated, and the case should be remanded for a remedial hearing aimed at determining the proper remedy for post-1992 elections.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

JAMES P. TURNER
Deputy Assistant Attorney General

JAMES A. FELDMAN
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
IRVING GORNSTEIN
Attorneys

NOVEMBER 1992

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

C.A. No. 92-40220 MP

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF FLORIDA, a State of the United States; T.K. WETHERELL, Speaker of the Florida House of Representatives; GWEN MARGOLIS, President of the Florida Senate; LAWTON CHILES, Governor of the State of Florida; ROBERT BUTTERWORTH, Attorney General for the State of Florida; PETER R. WALLACE, Chairman of the House Reapportionment Committee; JACK GORDON, Chairman of the Senate Reapportionment Committee; JIM SMITH, Secretary of State for the State of Florida, DEFENDANTS

COMPLAINT

[Filed Jun. 23, 1992]

The United States of America alleges that:

1. This is a complaint brought on behalf of the United States of America pursuant to 42 U.S.C. 1973, 42 U.S.C. 1973c, 42 U.S.C. 1973j(d), and 28 U.S.C. 2201, to enforce rights guaranteed by the Fourteenth and Fifteenth Amendments to the United States Constitution.

2. This Court has jurisdiction of this action pursuant to 28 U.S.C. 1345 and 42 U.S.C. 1973j(f).

3. Defendants are the State of Florida and officials thereof who have duties and responsibilities under the laws of that state to reapportion the Florida Legislature. Defendant T.K. Wetherell is Speaker of the Florida House of Representatives. Defendant Gwen Margolis is President of the Florida Senate. Defendant Lawton Chiles is Governor of the State of Florida. Defendant Robert Butterworth is the Attorney General for the State of Florida. Defendant Peter R. Wallace is Chairman of the House Reapportionment Committee. Defendant Jack Gordon is Chairman of the Senate Reapportionment Committee. Defendant Jim Smith is Secretary of State for the State of Florida and is responsible under the laws of that state to oversee the conduct of elections. All defendants are sued in their official capacities.

4. The Florida Legislature is comprised of a 120-member House of Representatives and a 40-member State Senate. Members of the House are elected concurrently to two-year terms. Members of the Senate are elected to four-year terms. However, terms of office for members of the Florida Senate are staggered such that half of the Senate runs for a two-year term and half of the Senate runs for a four-year term at the next election following a reapportionment, such as 1992. Members of the Florida House and Florida Senate are elected from single-member districts.

5. The State of Florida has experienced a significant increase in the number and percentage of Hispanic residents during the period from 1980 to 1990. According to the 1980 Census, the population of the State was 9,746,324, of whom 858,158 (8.80%) were Hispanic. According to the 1990 Census, the State's population has grown to 12,973,926, of whom 1,574,143 (12.17%) are Hispanics. In Dade County, the Hispanic population has grown from 580,994 in 1980 to 953,407 in 1990—an increase from 1980 of 64.1 percent. More than 60 percent of the State's Hispanic population resides in Dade County.

6. At the time of the planning for the redistricting on the basis of the 1990 Census, the defendants and members of the Florida Legislature were aware of the significant increase in Hispanic population that had occurred during the period from 1980 to 1990.

7. The Florida State Legislature passed a reapportionment plan ("SJR 2-G") to elect the members of the State Legislature on April 10, 1992. On May 13, 1992, the Florida Supreme Court issued a declaratory judgment determining the validity of SJR 2-G reapportioning the legislature of the State of Florida.

COUNT I

8. The redistricting plans for the members of the Florida Legislature dilute the voting strength of black citizens and Hispanic citizens in several areas of the State, including the following areas:

Dade County

a. In Dade County, Hispanic persons comprise a slight majority (50.5%) of the voting age population. The redistricting plan enacted by the State of Florida for the *House of Representatives* creates 20 districts in the Dade County area. The State's House plan fragments the Hispanic population concentrations such that Hispanics constitute a majority of the voting age population in only nine (9) districts;

b. With respect to the State *Senate* plan, the redistricting plan enacted by the State of Florida creates seven (7) districts in the Dade County area. The State's proposed Senate plan fragments the Hispanic population concentrations such that Hispanics comprise a majority of the voting age population only in three (3) districts;

c. The racial and ethnic population concentrations existing in the Dade County area are such that, if the Dade County area of the State is divided into equally populated legislative districts which respect communities of interests and follow other nondiscriminatory plan-drawing criteria, Hispanics would constitute a significant voting-age majority of the population in two additional districts in the House of Representatives, and one additional district in the Senate.

Escambia County

d. In the Pensacola-Escambia County area of the State, the redistricting plan enacted by the State of Florida for its House of Representatives divides Escambia County into four (4) House districts. The State's House plan fragments the black population in this area among several districts such that blacks comprise less than 26 percent of the voting age population in each of these four districts. Alternative plans have been developed which unite the black population concentrations in Pensacola-Escambia County into one district in which black citizens would have a meaningful opportunity to effect elections for the House of Representatives.

9. Elections in the State of Florida, including elections for positions in the State Legislature, are characterized by patterns of racial and ethnic bloc voting.

a. Hispanics are politically cohesive. Hispanic candidates for public office generally receive substantial support from Hispanic voters, but such candidates often are not successful in obtaining election because of a lack of support from other voters.

b. Blacks are politically cohesive. Black candidates for public office generally receive substantial support from black voters, but such candidates often are not successful in obtaining elections because of a lack of support from other voters.

10. Blacks and Hispanics in Florida have, historically, been the victims of official discrimination perpetrated by the State of Florida and local governments therein. Such discrimination has included discrimination touching on the right of black citizens and the Spanish-speaking and other language minorities to register, vote and participate in the political process.

11. Socioeconomic statistics demonstrate that blacks and Hispanics in Florida continue to bear the effects of discrimination in such areas as education, employment, income, health and housing. The depressed socioeconomic status of blacks and Hispanics in the State of Florida has a disparate and injurious effect on the ability of black and Hispanic citizens to participate equally in the political process and to have an equal opportunity to elect a candidate of their choice to the State Legislature.

12. Under the totality of circumstances, and in the context of the factual circumstances described in paragraphs 4 to 14, *supra*, the redistricting plans for the Florida House of Representatives and the Florida State Senate deprive Hispanic citizens and black citizens in the State of Florida of an equal opportunity to participate in the political process and to elect candidates of their choice to the State Legislature.

COUNT II

13. The United States realleges the facts set out in paragraphs 4 through 12, above.

14. The State's proposed Senate plan in the Hillsborough County area divided the politically cohesive minority populations in the Tampa and St. Petersburg areas

such that there were no senatorial districts in which minority persons constituted a majority of the voting age population. On June 16, 1992, the Attorney General interposed a timely objection to the Senate plan pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. The Senate plan is legally unenforceable. Alternative plans for the State Senate are available which remedy the Section 5 objection interposed by the Attorney General. These alternative plans unite the minority populations in Tampa and St. Petersburg to provide minority voters an effective opportunity to elect their preferred candidate to the State Senate.

15. With regard to both Counts I & II, unless enjoined by this Court, the defendants will fail to devise, and implement in 1992, plans for their State House and Senate plan which meet the requirements of federal law.

WHEREFORE, the United States prays that a three-judge Court be convened pursuant to 28 U.S.C. 2284 and 42 U.S.C. 1973c, and thereafter enter a judgment:

(a) Declaring that the redistricting plans for the Florida House of Representatives and the Florida Senate constitute voting standards, practices, or procedures within the meaning of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and that those redistricting plans violate Section 2;

(b) Declaring that the redistricting plan for the Florida State Senate is a standard, practice, or procedure with respect to voting within the meaning of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, and that the plan has failed to satisfy the preclearance requirements of Section 5;

(c) Enjoining defendants, their agents and successors in office, and all persons acting in concert with them from administering, implementing or conducting any election for members of the Flor-

ida House of Representatives and the Florida State Senate pursuant to the statutorily invalid plans; and

(d) Ordering defendants to devise new plans for the election of the Florida House and Florida Senate that meet the requirements of federal law. If the defendants fail to devise such plans, the Court should order plans into effect.

Plaintiff further prays that the Court grant such additional relief as the interests of justice may require, together with the costs and disbursements of this action.

WILLIAM P. BARR
Attorney General

By: /s/ John R. Dunne
JOHN R. DUNNE
Assistant Attorney General
Civil Rights Division

/s/ Kenneth W. Sukhia
KENNETH W. SUKHIA
United States Attorney

/s/ Steven H. Rosenbaum
STEVEN H. ROSENBAUM
Attorney, Voting Section
Civil Rights Division
Department of Justice
P.O. Box 66128
Washington, D.C. 20035-6128

/s/ Steven J. Mulroy
J. GERALD HEBERT
JAMES VIGIL
STEVEN J. MULROY
Attorneys, Voting Section
Civil Rights Division
Department of Justice
P.O. Box 66128
Washington, D.C. 20035-6128

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 342479 60094